

A **AMMB International (L) Ltd v
Penas Holdings Sdn Bhd & Anor**

HIGH COURT (KUALA LUMPUR) — SUIT NO D4-22-969 OF 1999
ABDUL MALIK ISHAK J
B 28 OCTOBER 2004

Civil Procedure — Summary judgment — Triable issues — Amount claimed in US Dollars and not converted into Ringgit Malaysia — Whether statement of claim irregular — Whether other triable issues render summary judgment not viable

C *Contract — Guarantee — Interest — Variation — Whether variation of interest amount to breach*

D *Contract — Guarantee — Interest payment of fees — Whether guarantee fee and share custodian fee together with interests represented damages — Whether contravened the Contracts Act 1950 s 75*

Contract — Guarantee — Banker's guarantee — Certificate of indebtedness — Whether conclusive

E Pursuant to a facility agreement between the first defendant and the plaintiff, the plaintiff had agreed to provide a bank guarantee in favour of Arab-Malaysian Merchant Bank Bhd ('AMMB') to the first defendant in US dollars equivalent to the sum of RM50 million. The second defendant thereupon agreed to become a principal debtor and guarantor and/or indemnify whatever sums outstanding under the bank guarantee granted by the plaintiff to the first defendant. By way of further security to the facility agreement, the first defendant had executed a memorandum of deposit of shares wherein the first defendant had pledged 6,250,000 shares in Penas Corp Bhd to the plaintiff.

F The plaintiff subsequently demanded the sum of RM655,807.72 being the guarantee fee and the share custodian fee together with interest against the first and the second defendants. Subsequently, the plaintiff had issued statements of account to the first defendant. The plaintiff had also exercised their power of sale under the memorandum of deposit of shares by selling the Penas Corp Bhd's. To date, the first and the second defendants have failed to pay the outstanding sum. The plaintiff's application for summary judgment was dismissed by the senior assistant registrar. The plaintiff appealed.

G It was contended by the defendants that: (1) the plaintiff's statement of claim was irregular in that the amount claimed was in US Dollars and was not converted into Ringgit Malaysia; (2) the statement of claim did not disclose a reasonable cause of action; (3) the validity period of the plaintiff's claim was for 12 months from 17 January 1997 to 16 January 1998 — since the plaintiff's claim was on 26 August 1998 it was therefore outside the validity period; (4) the statement of claim had failed to disclose the fate of the securities; (5) no notice

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had been issued by the plaintiff pertaining to the defendants' default; (6) the plaintiff had no right to vary the rate of interest because that would amount to a breach of contract; (7) the guarantee fee and the share custodian fee together with the interests represented damages which contravened s 75 of the Contracts Act 1950; (8) the defendants had not received any letters of demand from the plaintiff; and (9) there were manifest errors in the certificate of indebtedness and hence that certificate was said not to be conclusive.

Held, allowing the appeal with costs:

- (1) The plaintiff was entitled to fashion its claim in the US Dollars and this court would convert that claim in Ringgit Malaysia at the appropriate time — ie at the date of the judgment; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 followed. Also the defendants failed to plead the currency issue in their statement of defence and the principle of estoppel should be invoked against them vigorously (see para 7).
- (2) The plaintiff's cause of action was based on the facility agreement as well as on the personal guarantee and indemnity wherein the plaintiff acted as the guarantor for the defendants in respect of a claim by AMMB for a sum of USD equivalent to RM50 million. It was not necessary for the plaintiff to plead the terms and conditions of the personal guarantee and indemnity as well as the memorandum of deposit of shares because it was within the defendants' knowledge. There were no defects in the pleadings and the defendants were not taken by surprise nor were they led astray (see para 8).
- (3) On the issue that the plaintiff's claim was outside the validity period, the defendants themselves had made an application for extension of time of the facility agreement at the relevant time. Thus, the defendants should be estopped from raising this issue because they had applied for an extension of time from the plaintiff (see para 9).
- (4) It was within the plaintiff's prerogative to sell the shares. The right to sell those shares was vested with the plaintiff and that right had been exercised by the plaintiff and there was nothing sinister about it (see para 11); *China And South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536 followed.
- (5) The plaintiff had sent letters of demand to the defendants in regard to the default. And the defendants had acknowledged acceptance of the letters through registered post. The defendants' contention that no notice had been issued by the plaintiff pertaining to the defendants' default was without merit (see para 13).
- (6) Clause 7.2(iii) of the facility agreement read together with cl 6.1 show that the plaintiff has the right to vary the rate of interest. The defendants were informed about the rates of interest and the costs of the fund vide

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- A** the default notices. The plaintiff's statement of claim also contained details in regard to the rates of interest (see para 14).
- (7) The guarantee fee and the share custodian fee have been provided under the facility agreement which were agreed by the defendants and so the fees mentioned therein cannot be construed as damages. Therefore s 75 of the Contracts Act 1950 has no relevance at all (see para 16).
- B**
- (8) Pursuant to cl 18 of the facility agreement and cl 25 of the personal guarantee and indemnity, the letters of demand which had been served on the defendants must be held to be regular. There was evidence that the plaintiff had sent letters of demand to the defendants claiming, *inter alia*, for the principal sum with interest and the guarantee fee and the share custodian fee. The defendants contention that they had not received any letters of demand from the plaintiff was devoid of merit (see para 17).
- C**
- (9) The defendants only made bare allegations and have not shown any manifest error and as such that certificate of indebtedness must be held to be conclusive pursuant to cl 18.1 of the facility agreement (see para 18); *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 followed; *Malayan Banking Bhd v Yeo Sun Tong* [1999] 4 CLJ 425 not followed.
- D**

E [Bahasa Malaysia summary]

Menurut perjanjian kemudahan di antara defendan pertama dan plaintiff, plaintiff bersetuju untuk memberi jaminan bank yang memihak Arab-Malaysian Merchant Bank Bhd ('AMMB') kepada defendan pertama dalam Dollar Amerika bersamaan dengan jumlah RM50 juta. Defendan kedua setelah itu bersetuju untuk menjadi penghutang utama dan penjamin dan/atau akan menanggunggrugi apa jumlah yang tertunggak di bawah jaminan bank tersebut yang diberikan oleh plaintiff kepada defendan pertama. Sebagai jaminan tambahan kepada perjanjian kemudahan tersebut, defendan pertama telah menyempurnakan satu memorandum deposit saham-saham yang mana defendan telah mencagarkan 6,250,000 saham-saham dalam Penas Corp Bhd kepada plaintiff.

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Plaintif kemudiannya menuntut wang sejumlah RM655,807.72 iaitu yuran jaminan dan yuran penyimpanan saham bersama dengan faedah dari defendan pertama dan kedua. Seterusnya, plaintiff telah mengeluarkan pernyataan-pernyataan akaun kepada defendan pertama. Plaintiff juga telah menggunakan kuasa menjualnya di bawah memorandum deposit saham-saham dengan menjual saham-saham Penas Corp Bhd. Setakat ini, defendan pertama dan kedua telah gagal membayar jumlah tertunggak. Permohonan plaintiff untuk menghakimkan terus ditolak oleh penolong kanan pendaftar. Plaintiff merayu.

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Defendan-defendan mendakwa bahawa: (1) Pernyataan tuntutan plaintiff di luar aturan betul kerana jumlah yang dituntut adalah dalam Dollar Amerika dan

tidak ditukarkan kepada Ringgit Malaysia; (2) pernyataan tuntutan tidak menyatakan kausa tuntutan yang munasabah; (3) tempoh yang sah tuntutan plaintif adalah 12 bulan dari 17 Januari 1997 hingga 16 Januari 1998 — oleh kerana tuntutan plaintif dibuat pada 26 Ogos 1998 ianya dengan itu di luar tempoh yang sah; (4) pernyataan tuntutan gagal menunjukkan nasib cagaran-cagaran tersebut; (5) tiada notis dikeluarkan oleh plaintif berhubung dengan keingkaran defendan-defendan; (6) plaintif tidak mempunyai hak untuk meminda kadar faedah kerana ia akan menjadi satu kemungkiran kontrak; (7) fee jaminan dan fee penyimpan saham bersama dengan faedah yang merupakan ganti rugi itu bertentangan dengan s 75 Akta Kontrak 1950; (8) defendan-defendan tidak menerima sebarang surat-surat tuntutan dari plaintif; dan (9) terdapat kesilapan manifes di dalam sivil keberhutangan dan dari itu sivil tersebut tidak boleh dikatakan tidak boleh dipertikaikan.

Diputuskan, membenarkan rayuan dengan kos:

- (1) Plaintif berhak menuntut dalam Dollar Amerika dan mahkamah ini akan menukarkan tuntutan tersebut ke Ringgit Malaysia pada masa yang bersesuaian — iaitu pada tarikh penghakiman; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 diikuti. Juga defendan-defendan gagal memohon isu matawang di dalam pernyataan pembelaan mereka dan rukun estoppel boleh dibangkitkan terhadap mereka secara keras (lihat perenggan 7).
- (2) Kausa tindakan plaintif berdasarkan kepada perjanjian kemudahan dan juga jaminan peribadi dan tanggung rugi di mana plaintif bertindak sebagai penjamin kepada defendan-defendan berhubung dengan tuntutan dari AMMB untuk jumlah Dollar Amerika bersamaan dengan RM50 juta. Ianya tidak perlu bagi plaintif untuk memohon terma-terma dan syarat-syarat jaminan peribadi dan tanggung rugi dan juga memorandum deposit saham-saham kerana ianya dalam pengetahuan defendan-defendan. Tidak terdapat kecacatan-kecacatan di dalam pliding dan defendan-defendan tidak dikejutkan ataupun disesatkan (lihat perenggan 8).
- (3) Mengenai isu tuntutan plaintif di luar tempoh yang sah, defendan-defendan sendiri telah membuat permohonan untuk melanjutkan masa perjanjian kemudahan tersebut pada masa yang relevan. Maka, defendan-defendan patut diestopkan dari membangkitkan isu ini kerana mereka telah memohon untuk perlanjutan masa dari plaintif (lihat perenggan 9).
- (4) Ianya merupakan hak plaintif untuk menjual saham-saham tersebut. Hak menjual saham-saham tersebut terletak pada plaintif dan hak tersebut telah digunapakai oleh plaintif dan tiada yang mencurigakan mengenainya (lihat perenggan 11); *China And South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536 diikuti.

- A** (5) Plaintiff telah menghantar surat-surat tuntutan kepada defendan-defendan berhubung dengan pengingkaran tersebut. Dan defendan-defendan telah mengaku terima surat-surat tersebut melalui pos berdaftar. Dakwaan defendan-defendan bahawa tiada notis dikeluarkan oleh plaintiff berhubung dengan pengingkaran defendan-defendan adalah tanpa merit (lihat perenggan 13).
- B** (6) Klausula 7.2(iii) perjanjian kemudahan dibaca bersama dengan kl 6.1 menunjukkan yang plaintiff mempunyai hak untuk meminda kadar faedah. Defendan-defendan telah diberitahu mengenai kadar faedah dan kos dana melalui notis-notis pengingkaran. Pernyataan tuntutan plaintiff juga mengandungi butir-butir mengenai kadar faedah (lihat perenggan 14).
- C** (7) Yuran jaminan dan yuran menyimpan saham telah diperuntukkan di bawah perjanjian kemudahan yang telah dipersetujui oleh defendan-defendan dan dari itu yuran-yuran tersebut tidak boleh dikira sebagai ganti rugi. Oleh yang demikian s 75 Akta Kontrak 1950 adalah tidak relevan sama sekali (lihat perenggan 16).
- D** (8) Mengikut kl 18 perjanjian kemudahan tersebut dan kl 25 jaminan peribadi dan tanggung rugi, surat-surat tuntutan yang telah diserahkan kepada defendan-defendan mesti diputuskan sebagai mengikut aturan. Terdapat keterangan yang plaintiff telah menghantar surat-surat tuntutan kepada defendan-defendan menuntut, antara lain, jumlah wang pokok bersama dengan faedah dan yuran jaminan dan yuran menyimpan saham. Dakwaan defendan-defendan yang bahawa mereka tidak menerima sebarang surat-surat tuntutan dari plaintiff tidak mempunyai merit (lihat perenggan 17).
- E** (9) Defendan-defendan hanya membuat dakwaan semata dan tidak menunjukkan sebarang kesilapan manifes dan dengan itu sijil keberhutangan itu mestikah diputuskan sebagai tidak boleh dipertikaikan selaras dengan kl 18.1 perjanjian kemudahan tersebut (lihat perenggan 18); *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 diikuti; *Malayan Banking Bhd v Yeo Sun Tong* [1999] 4 CLJ 425 tidak diikuti.]
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Notes

- H** For cases on guarantees generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3345–3588.
For cases on summary judgments, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173.
For cases on triable issues, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173.
- I** For guarantees, see 16 *Halsbury's Laws of Malaysia* paras [270.003]–[270.062].
For summary judgement, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.6–048]—[10.6–057].

Cases referred to**A***Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 (refd)*Ashpitel v Bryan* (1863) 3 B&S 474 (refd)*Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 (refd)*China And South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536 (folld)**B***Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (folld)*H v H* (1928) P 206 (refd)*Harriman v Harriman* (1909) P 123 (refd)*KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 (refd)**C***Low v Bouverie* (1891) 3 Ch 82 (refd)*Malayan Banking Bhd v Yeo Sun Tong* [1999] 6 MLJ 377; [1999] 4 CLJ 425 (not folld)*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (refd)*Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 (folld)*Moorgate Mercantile Co Ltd v Twitchings* [1975] 3 All ER 314, [1975] 3 WLR 286 (refd)**D***Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 (refd)*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (refd)*Ooi Han Sun & Anor v Bee Hua Meng* [1991] 3 MLJ 219 (refd)*Ottos Kopje Diamond Mines Ltd, Re* (1893) 1 Ch 618 (refd)*Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 (refd)**E***PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1998] 7 MLJ 270 (refd)*Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393 (refd)*Wardley Ltd v Tunku Adnan & Anor* [1991] 3 MLJ 366 (refd)*Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor* [1994] 2 MLJ 497 (refd)**F****Legislation referred to**

Contracts Act 1950 s 75

Rules of the High Court 1980 O 14

G*V Vijakumar (Albar & Partners) for the plaintiff.**Lai Kwan Kam (KK Lai & Co) for the defendants.***Abdul Malik Ishak J:****H**

INTRODUCTION

[1] The plaintiff's application for summary judgment was dismissed by the learned senior assistant registrar ("SAR") and the plaintiff has since filed an appeal to the judge in chambers against the decision of the SAR and it can be seen in encl 9. I allowed the plaintiff's appeal in encl 9 with costs and I then closed the file. I will now set out my reasons for doing so.

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A BRIEF FACTS OF THE CASE

[2] Pursuant to a facility agreement dated 16 January 1997 between the first defendant and the plaintiff wherein the first defendant had requested and the plaintiff had agreed to provide a bank guarantee in favour of Arab-Malaysian Merchant Bank Bhd ('AMMB') in US dollars equivalent to the sum of RM50 million. Upon execution of the facility agreement the plaintiff had issued a bank guarantee dated 17 January 1997 to AMMB accordingly.

[3] Pursuant to a personal guarantee and indemnity dated 1 December 1997 in consideration of providing the bank guarantee to the first defendant, the second defendant, *inter alia*, had agreed to become a principal debtor and guarantor and/or indemnify whatever sums outstanding under the bank guarantee granted by the plaintiff to the first defendant including interest, costs and whatever expenses which would have been incurred by the plaintiff to enforce the plaintiff's rights.

[4] By way of further security to the facility agreement, the first defendant had executed a memorandum of deposit of shares dated 16 January 1997 wherein the first defendant had pledged 6,250,000 shares in Penas Corp Bhd to the plaintiff.

[5] The plaintiff had received a letter dated 26 August 1998 from AMMB claiming for the guaranteed sum of RM50,000,000 under the bank guarantee. On 26 August 1998, without fail the plaintiff thereupon paid the sum of USD11,853,959.22 under the bank guarantee to AMMB accordingly.

[6] The plaintiff through its previous solicitors M/s Albar Zulkifly & Yap by letters dated 28 August 1998 had demanded the sum of RM655,807.72 being the guarantee fee and the share custodian fee together with interest against the first and the second defendants as reflected at exhs 'POWS-6' at p 71 and 'POWS-7' at p 74 of encl 4. It is pertinent to state that the first and the second defendants had acknowledged receipt of the letters of demand as evidenced through the certificate of posting as seen in exhs 'POWS-6' at p 73 and 'POWS-7' at p 76 of encl 4. Subsequently, the plaintiff had issued statements of account to the first defendant. The plaintiff had also exercised their power of sale under the memorandum of deposit of shares by selling the Penas Corp Bhd's shares and this fact was relayed to the first defendant by way of a letter dated 3 June 1999. In fact, these shares were sold subsequent to the filing of the writ which was on 8 April 1999. The plaintiff too had informed the second defendant about the sale of those shares. Two pertinent factual matrix ought to be mentioned. Firstly, the plaintiff had given a statement of account as at 9 October 2000. Secondly, the plaintiff had enclosed the certificate of indebtedness. To date, the first and the second defendants have failed or refused to pay the outstanding sum as stated in the O 14 application in encl 5. With these plain simple facts, the plaintiff prayed that its appeal in encl 9 be allowed with costs.

[6] The plaintiff through its previous solicitors M/s Albar Zulkifly & Yap by letters dated 28 August 1998 had demanded the sum of RM655,807.72 being the guarantee fee and the share custodian fee together with interest against the first and the second defendants as reflected at exhs 'POWS-6' at p 71 and 'POWS-7' at p 74 of encl 4. It is pertinent to state that the first and the second defendants had acknowledged receipt of the letters of demand as evidenced through the certificate of posting as seen in exhs 'POWS-6' at p 73 and 'POWS-7' at p 76 of encl 4. Subsequently, the plaintiff had issued statements of account to the first defendant. The plaintiff had also exercised their power of sale under the memorandum of deposit of shares by selling the Penas Corp Bhd's shares and this fact was relayed to the first defendant by way of a letter dated 3 June 1999. In fact, these shares were sold subsequent to the filing of the writ which was on 8 April 1999. The plaintiff too had informed the second defendant about the sale of those shares. Two pertinent factual matrix ought to be mentioned. Firstly, the plaintiff had given a statement of account as at 9 October 2000. Secondly, the plaintiff had enclosed the certificate of indebtedness. To date, the first and the second defendants have failed or refused to pay the outstanding sum as stated in the O 14 application in encl 5. With these plain simple facts, the plaintiff prayed that its appeal in encl 9 be allowed with costs.

THE REASONS FOR ALLOWING THE APPEAL IN ENCL 9

[7] It was contended by both the defendants that the plaintiff's statement of claim was irregular in that the amount claimed was in American Dollars and was not converted into Ringgit Malaysia. With respect, this contention cannot hold water. The plaintiff was entitled to fashion its claim in the American Dollars and this court would convert that claim in Ringgit Malaysia at the appropriate time. And the appropriate time would be at the date of the judgment. Indeed this was the approach adopted by the House of Lords in the case of *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443. In short, it is now possible and permissible to give judgment in a foreign currency and enforce it by applying the rate of exchange at the date of payment or at the date of execution. This simple and logical principle of law has been accepted here as well as across the causeway (*Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor* [1994] 2 MLJ 497; *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1998] 7 MLJ 270; *Ooi Han Sun & Anor v Bee Hua Meng* [1991] 3 MLJ 219; and *Wardley Ltd v Tunku Adnan & Anor* [1991] 3 MLJ 366). Be that as it may, the defendants failed to plead the currency issue in their statement of defence and the principle of estoppel should be invoked against them vigorously (*Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332).

[8] Next, it was contended by the defendants that the statement of claim did not disclose a reasonable cause of action. I beg to disagree. I must say, at once, that the plaintiff's cause of action was based on the facility agreement as well as on the personal guarantee and indemnity wherein the plaintiff acted as the guarantor for the defendants in respect of a claim by AMMB for a sum of USD equivalent to RM50 million. AMMB had made a claim against the plaintiff through a letter dated 26 August 1998 and thereafter the plaintiff had made the payment to AMMB. This fact was within the defendants' knowledge and it cannot be doubted and this was pleaded in paras 4, 5, 6 and 7 of the plaintiff's statement of claim. I am of the view that it was not necessary for the plaintiff to plead the terms and conditions of the personal guarantee and indemnity as well as the memorandum of deposit of shares because it was within the defendants' knowledge. It must be borne in mind that the defendants had executed those documents and they must by implication knew about its contents. There were no defects in the pleadings and the defendants were not taken by surprise nor were they led astray (*Rosita bte Babarom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393; *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10; and *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577).

[9] Next, it was contended that the validity period of AMMB's claim was for twelve (12) months from 17 January 1997 to 16 January 1998. It was also contended that since the plaintiff's claim was on 26 August 1998 it was therefore outside the validity period. With respect, these contentions failed to take into

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- A** account that the defendants themselves had made an application for extension of time of the facility agreement on 5 February 1997, 16 January 1998 and 13 August 1998. Thus, the defendants should be estopped from raising this issue because they had applied for an extension of time from the plaintiff. Estoppel arises where a party is not allowed to say that a certain statement of fact is untrue. The older authorities would prefer to call it 'conclusion' rather than estoppel. Sometimes it is referred to as 'concluded' where a party is precluded from alleging that a fact is otherwise than it has been made to appear. According to *Termes de la Ley*, on Estoppel as cited in *Ashpitel v Bryan* (1863) 3 B&S 474 at 489; and in *H v H* (1928) P 206 at 214, an 'estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth'. Some judges would describe estoppel as a rule of evidence (*Low v Bouverie* (1891) 3 Ch 82 at 105, CA, per Bowen LJ, and at 101 per Lindley LJ; *Re Ottos Kopje Diamond Mines Ltd* (1893) 1 Ch 618 at 628, CA, per Bowen LJ; and *Harriman v Harriman* (1909) P 123 at 144, CA, per Farwell LJ), and others would view it as a substantive rule of law (*Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 at 56, PC). That brilliant judge by the name of Lord Denning MR in *Moorgate Mercantile Co Ltd v Twitchings* [1975] 3 All ER 314, [1975] 3 WLR 286 at 296, CA aptly said:

- E** Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity.

[10] I fully endorse and subscribe to the views of Lord Denning MR.

- F** **[11]** Going on an uphill task, the defendants further contended that the statement of claim had failed to disclose the fate of the securities. But the defendants had overlooked the fact that it was within the plaintiff's prerogative to sell the shares. In fact, the Penas Corp Bhd's shares had been sold by the plaintiff. Incidentally, the plaintiff had already explained to the defendants that it had sold half of the Penas Corp Bhd's shares and that the proceeds of the sale had been taken into account. The right to sell those shares was vested with the plaintiff and that right had been exercised by the plaintiff (*China And South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, PC) and there was nothing sinister about it. In *China And South Sea Bank Ltd v Tan Soon Gin (alias George Tan)*, the defendant appellant by the name of George Tan was sued as a guarantor for a borrower by the name of Carrian Holdings Ltd. The loan was secured by a pledge of shares by a company called Filomena Ltd. The pledged shares belonged to Carrian Investments Ltd. The bank was entitled to have sold the pledged shares in November 1982 and apparently if that had been done, a substantial amount could have been realised. But the bank did not invoke its powers of sale not even when Carrian Investment Ltd was wound up in 1983 and not even when the co-guarantor pledgor of the shares by the name of Filomena Ltd was wound up in 1984. The Court of Appeal said that even up to the time the judgment of the court was being read

and that was on 17 March 1988, the shares had not been sold. The appeal was allowed and the guarantor defendant was given unconditional leave to defend. The plaintiffs appealed to the Privy Council and the decision of the Court of Appeal was reversed. The Privy Council held that the mortgagee was not a trustee of the power of sale and that once the power of sale has accrued the mortgagee was entitled to exercise it for his own purposes and to sell as and when he chose to do so. Here, the plaintiff had sold half of the Penas Corp Bhd's shares and did not waste any time in doing so.

[12] In my judgment, there were no merits in the defendants' complaints and the summary judgment should be granted in favour of the plaintiff (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, SC).

[13] The defendants' contended that no notice had been issued by the plaintiff pertaining to the defendants' default. With respect, there was no merit at all to such a contention. It must be borne in mind that the plaintiff had sent letters of demand to the defendants in regard to the default. Indeed AMMB had demanded USD 11,853,959.22 for the defendants' failure to pay the guarantee fee and the share custodian fee. And the defendants had acknowledged acceptance of the letters through registered post (*Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413, SC). Moreover, the letters of demand were correctly issued pursuant to cl 12 and 18 of the facility agreement against the first defendant and cl 25 against the second defendant respectively.

[14] Next, it was contended on behalf of the defendants that the plaintiff has no right to vary the rate of interest because that would amount to a breach of contract. In my judgment, such a contention was without merit. Clause 7.2(iii) of the facility agreement must be read together with cl 6.1 and when so read it would show that the plaintiff has the right to vary the rate of interest. The facility agreement even goes to the extent of providing for interest rate of 2% per annum above the guarantee fee of 1.5% per annum plus costs of the fund of 8.25% per annum. The defendants were informed about the rates of interest and the costs of the fund vide as per the default notices. The plaintiff's statement of claim too contained details in regard to the rates of interest. In the circumstances, the defendants should be estopped from raising this issue for two obvious reasons:

- (1) the plaintiff had given the relevant notices; and
- (2) the defendants have admitted to the same without any objection whatsoever and without contradicting the plaintiff.

[15] The case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, CA should be cited in favour of the plaintiff in the context of the failure of the defendants to contradict a positive assertion upon a material issue.

[16] Next, it was contended by the defendants that the guarantee fee and the share custodian fee together with the interests represented damages which

A contravened s 75 of the Contracts Act 1950. These arguments cannot hold for the following reasons:

(1) that the guarantee fee and the share custodian fee have been provided under the facility agreement which were agreed by the defendants and so the fees mentioned therein cannot be construed as damages; and

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(2) for the aforesaid reasons as in (1), s 75 of the Contracts Act 1950 has no relevance at all.

[17] The defendants contended that they had not received any letters of demand from the plaintiff. It was a contention that was devoid of merit. It must be emphasised that pursuant to cl 18 of the facility agreement and cl 25 of the personal guarantee and indemnity, the letters of demand which had been served on the defendants must be held to be regular. There was evidence that the plaintiff had sent letters of demand to the defendants claiming, *inter alia*, for USD11,853,959.22 being the principal sum, and USD742,806.95 being the interest and USD655,807.72 being the guarantee fee and the share custodian fee until 26 August 1998. When the summary judgment application was filed under O 14 the plaintiff had only applied for judgment for and in USD sums because the proceeds from the sale of shares had been taken into account and set-off with the payments of the guarantee fee, the share custodian fee and interests which amounted to RM655,807.72.

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[18] Yet again, the defendants contended that there were manifest errors in the certificate of indebtedness and hence that certificate was said not to be conclusive. I rejected such contentions for the following reasons: the defendants only made bare allegations and have not shown any manifest error and as such that certificate must be held to be conclusive pursuant to cl 18.1 of the facility agreement. In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, FC, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) writing for the then Federal Court aptly said at p 284 of the report:

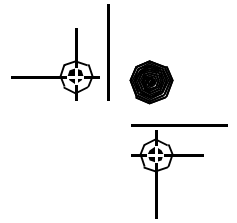
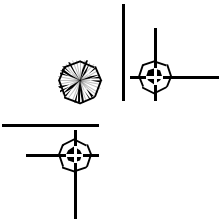
F

G In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus: 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives.' It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate: see *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643; *Bache & Co v Banque Vernes* [1973] 2 LL LR 437.

H

[19] I was asked to dutifully follow the case of *Malayan Banking Bhd v Yeo Sun Tong* [1999] 4 CLJ 425, a decision of the High Court in regard to the issue of the certificate of indebtedness. But I declined to do so. I was guided by the principle of *stare decisis*. I must abide by precedents and I am bound to follow *Citibank NA v Ooi Boon Leong & Ors*.

I



CONCLUSION

A

[20] For the reasons as adumbrated above, I allowed the plaintiff's appeal in encl 9 with costs. I too ordered the closure of the file.

Appeal allowed.

Reported by Loo Lai Mee

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